Ah San @ Goh Ah Soon v Majlis Bandaraya Ipoh & Ors

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO A-02-510 OF 1997
NH CHAN, ABDUL MALEK AHMAD AND MOKHTAR SIDIN JJCA
24 OCTOBER 1998

Civil Procedure *— Injunction — Injunction to restrain defendants from erecting building — Building to be erected on reserve lane — Planning permission obtained from local authority — Whether damages an adequate remedy*

The appellant was the owner of a piece of land located next to a lane reserve and obtained planning permission from the first respondent on 24 September 1996 to construct a two storey shop with side windows overlooking the lane reserve. In June 1997, the appellant discovered that the first respondent gave the second respondent planning permission to build a two storey shop on the lane reserve. It was later discovered that a title deed to the lane reserve was issued by the state authority to the second respondent. The appellant then filed a writ of summons on 18 July 1997 seeking for a declaratory order that the planning approval granted by the first respondent to the second respondent was null and void, and for a perpetual injunction against the second and fourth respondents to restrain them from proceeding with the construction of the shop on the lane reserve as the proposed building would deprive the appellant of a view through the side windows overlooking the lane reserve. The appellant also contended that no notice of planning permission of the adjoining lane reserve had been served on her. The High Court refused to grant the injunction and held that damages would be an adequate remedy. The appellant appealed.

Held, dismissing the appeal with costs:

The learned trial judge was right in refusing the injunction as the second respondent had been issued with a legitimate title deed to the lane reserve by the state authority and should not be stopped from putting up a building pursuant to a valid planning permission granted by the first respondent. In this case, the modification of the appellant's building plans with regard to the side windows subject to an award of damages would be an adequate remedy for the appellants. Further, the appellant could be compensated by the first respondent by virtue of s 25(8) of the Town and Country Planning Act 1976 (see pp 619G–620E).

[Bahasa Malaysia summary

Perayu adalah pemilik sebidang tanah yang terletak bersebelahan dengan jalan simpanan dan memperoleh kebenaran merancang daripada responden pertama pada 24 September 1996 untuk membina kedai dua tingkap dengan tingkap tepi yang dapat melihat

jalan simpanan tersebut. Pada Jun 1997, perayu telah mendapat tahu bahawa responden pertama telah memberikan responden kedua kebenaran merancang untuk membina sebuah kedai dua tingkap di jalan simpanan. Ia kemudian diketahui bahawa suratcara hak milik kepada jalan simpanan tersebut telah dikeluarkan oleh pihak berkuasa negeri kepada responden kedua. Perayu kemudian memfailkan writ saman pada 18 Julai 1997 meminta perintah pengisytiharaan bahawa kebenaran merancang yang diberikan oleh responden pertama kepada responden kedua adalah batal dan tidak sah, dan untuk suatu injunksi tetap terhadap responden kedua hingga keempat untuk menegah mereka daripada memulakan pembinaan kedai tersebut di atas jalan simpanan kerana bangunan yang dicadangkan akan menghalang perayu daripada pemandangan melalui tingkap tepi yang dapat melihat jalan simpanan tersebut. Perayu juga menegaskan bahawa tiada notis kebenaran merancang di atas jalan simpanan yang bersebelahan telah diberikan kepadanya. Mahkamah Tinggi enggan memberikan injunksi dan memutuskan bahawa ganti rugi adalah remedi yang mencukupi. Perayu telah merayu.

Diputuskan, menolak rayuan dengan kos:

Hakim yang membicara adalah betul apabila enggan memberikan injunksi kerana responden kedua telah diberikan suratcara hak milik yang sah ke atas jalan simpanan oleh pihak berkuasa negeri dan tidak patut dihentikan daripada membina suatu bangunan menurut kebenaran merancang yang sah yang diberikan oleh responden pertama. Di dalam kes ini, pengubahsuaian pelan bangunan perayu berkenaan dengan tingkap tepi tertakluk kepada award ganti rugi adalah remedi yang mencukupi untuk perayu-perayu. Selanjutnya, perayu tersebut boleh dipampaskan oleh responden pertama menurut s 25(8) Akta Perancangan Bandar dan Desa 1976 (lihat ms 619G–620E).]

Notes

For cases on injunctions generally, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 1927–2353.

Cases referred to

Associated Provincial Picture Houses Ltd v Wednesbury Corp [1947] 2 All ER 680 (refd)

Hunter & Ors v Canary Wharf Ltd [1997] AC 655 (refd)

Yahya bin Kassim v Government of Malaysia & Anor [1997] 3 MLJ 749 (refd)

Legislation referred to

Rules of the High Court 1980 O 53 r 1A

Town and Country Planning Act 1976 ss 21(6), 25(7), (8), (9)

Appeal from: Civil Suit No 22–88 of 1997 (High Court, Ipoh)

Chan Kok Keong (*Yau Wai Leong* with him) (*Chan & Assoc*) for the appellant.

A Silvanathan (*Shanti Sankey* with him) (*Kean Chye & Sivalingam*) for the first respondent.

Lee Pooi Mun (*Khong & Son*) for the second and fourth respondents.

Abdul Malek Ahmad JCA (delivering judgment of the court): At the commencement of the appeal before us, learned counsel for the appellant, who was the plaintiff in the court below, produced his outline of submissions and told the court that planning permission was granted to his client on 24 December 1996 and the writ was filed on 18 July 1997.

Our immediate response was that for judicial review, it must be filed within a certain time limit whereupon learned counsel for the first respondent promptly referred us to the case of *Yahya bin Kassim v Government of Malaysia & Anor* [1997] 3 MLJ 749 where this court had ruled that applications for an order of certiorari to quash a decision must be made within six weeks of the decision in question pursuant to O 53 r 1A of the Rules of the High Court 1980. It further ruled that leave is required before the substantive application can be filed and that the failure to apply within the time limit is usually fatal.

Learned counsel for the appellant asked for time to get instructions which we granted. About an hour later, the case was recalled whereupon learned counsel for the appellant told us that although the case cited was against him, there were a number of Supreme Court decisions to the contrary. He added that in England an application is only refused when there is unreasonable delay. On their part, they only knew in June 1997 when the fourth defendant went into the relevant lane reserve. However, he conceded that even if they took 1 June 1997, the writ would still have been late by two days. Nevertheless, he stressed that this point was not in issue in the court below and all that he was asking for was a right of hearing.

The reply from learned counsel for the first respondent, in a change of stance in a manner conceding that leave was not applicable in this instance, was that this was not a case for judicial review as it is for a declaratory judgment. He submitted that the right to be heard does not arise referring to s 21(6) of the Town and Country Planning Act 1976 ('the Act') which reads:

> If the proposed development is located in an area in respect of which no development plan exists for the time being, then, upon receipt of an application for planning permission, or, where directions have been given under sub-s (3), upon compliance with the directions, the local planning authority shall, by notice in writing served on them, inform the owners of the lands adjoining the land to which the application relates of their right to object to the application and to state their grounds of objection within twenty-one days of the date of service of the notice.

He also referred to s 25 of the Act which does not give an aggrieved party the right to be heard as it only provides for the amount of compensation to be offered to the aggrieved party should he be dissatisfied. Section 25(9) of the Act states:

> If any person is aggrieved by the amount of any reimbursement or compensation offered or paid to him under this section, he may, within the time and in the manner prescribed, appeal to the Appeal Board and the Appeal Board shall assess the amount of reimbursement or compensation to be paid.

He further cited the case of *Hunter & Ors v Canary Wharf Ltd* [1997] AC 655 where it was held, in dismissing the plaintiffs' appeal in the first action, that an owner was entitled to build on his land as he wished, subject to planning control, and was not generally liable, in the absence of an easement or agreement, if his building interfered with his neighbours' enjoyment of their land; and that, accordingly, since the interference with the plaintiffs' reception of television signals was the result simply of the presence of the building on the defendants' land, no action in private nuisance lay in respect of such interference. In the instant appeal, the interference was the loss by the appellant of the view of the side windows.

Learned counsel for the second and fourth respondents argued that there was no cause of action against them as they are merely the registered owner and contractor respectively and were not the ones who granted the planning permission as in the case of the first respondent.

It is now relevant to refer to the facts.

In this writ of summons and statement of claim dated 18 July 1997, the appellant had sought a declaratory order that the building approval given by the first respondent to build on land held under HS (M) UK 5108, No PT 138040, Kampong Baharu Gunung Rapat, Mukim Hilir Kinta, in the State of Perak ('the land') belonging to the second respondent is null and void.

The said land previously belonged to the third respondent. He was not served and therefore did not participate in this appeal. The fourth respondent is the contractor engaged by the second respondent to build a two storeyed shop on the said land. The appellant had also sought a perpetual injunction against the second and fourth respondents from proceeding with the construction of the said shop on the said land.

By way of summons in chambers also dated 18 July 1997, the appellant had applied for an interim or interlocutory injunction restraining the second and fourth respondents by themselves, their servants or agents from building on the said land.

The appellant's supporting affidavit averred that she was the owner of Lot 496 which was next to a lane reserve which is now the said land. Apparently, on 24 September 1996, the first respondent had given planning permission to the appellant to construct a two storeyed shop on Lot 496 with side windows overlooking the lane reserve.

However, in June 1997, she discovered that the first respondent had given planning permission to the second respondent to build on the said lane reserve evident by a board to that effect erected on the said land.

Further inquiries revealed that the title deed had been issued to the second respondent in respect of the said lane reserve. It is the contention of the appellant that the said planning permission would mean the appellant

A would be deprived of the said windows overlooking the lane reserve. It was an infringement of her rights, the appellant continued, as her corner lot had become an intermediate lot. To top it all, no notice of the planning permission had been served on her.

The argument of the appellant was that the planning permission
B granted by the first respondent as regards the lane reserve was mala fide and a complete violation of the appellant's rights. The infringement of her right to the side windows and not being informed of it was a breach of a fundamental right of natural justice. This, according to her learned counsel, amounted to a nullity as regards the first respondent's decision to grant planning permission to the second respondent citing *Associated Provincial*
C *Picture Houses Ltd v Wednesbury Corp* [1947] 2 All ER 680 in support.

Learned counsel for the appellant submitted that damages were not an adequate remedy and an interlocutory injunction ought to be granted to restrain further construction on the said land until the outcome of the suit.

The reply of the first respondent was that the alienation of the lane
D reserve was not within their jurisdiction but that of the state authority as once the second respondent was given an indefeasible title, he is entitled to build subject to planning permission being granted by the first respondent. Their error in this instance, he submitted, was not fatal. It was only a matter of doing slight modifications to the building plans of the appellant subject to making compensation to the appellant referring to sub-s (7) of s 25 of the
E Act for the purpose. He added that the second respondent was also quite willing to compensate the appellant. The said subsection reads:

> If a planning permission or an approval of a building plan is revoked under sub-s (1) and the person to whom the permission or approval was granted claims from the local planning authority, within the time and in the manner
F prescribed, compensation for any expenditure incurred by him in carrying out works to implement the permission or approval prior to its revocation or modification, the local planning authority shall, after giving the person a reasonable opportunity to be heard, offer such compensation to him as the local planning authority thinks adequate.

The learned trial judge was of the view that the second respondent had been
G issued with a legitimate title deed to the lane reserve adjacent to the appellant's land. Consequently, the second respondent had submitted plans for building approval to the first respondent who the learned trial judge found took a rather cavalier attitude in approving the second respondent's application knowing fully well that there was a strong likelihood that it may infringe the rights of the appellant. Adding insult to injury, no notice was
H given to the appellant.

The question before the learned trial judge was that if the appellant were to succeed at the trial would she be adequately compensated for the interim continuance of the second respondent's activities? Conversely, if the second respondent was to succeed in the action, the question was whether
I they would be adequately compensated for the interim injunction imposed.

The learned trial judge, in stating that damages would be an adequate remedy, stressed that the appellant was only deprived of the side windows

which may either have to be modified or removed completely. This deprivation due to the alienation of the lane reserve, he added, was the fault of the state authority who should have been named as a party to the proceedings.

He also found that the first respondent was also at fault for approving the planning permission to the second respondent 'in wanton disgrace to the prior planning approvals given to the plaintiff'. However, he held that this could be compensated by damages by virtue of sub-s (8) of s 25 of the Act which provides:

> Where a planning permission or an approval of a building plan is modified under sub-s (1), the local planning authority shall reimburse the person to whom the permission or approval was granted the costs actually and reasonably incurred by him in implementing the modification, being costs that he would not have incurred had the modification not been ordered, and shall compensate him for any loss suffered as a result of the modification.

The learned trial judge further was of the view that if an interlocutory injunction is granted, it would deprive the second respondent, as owner, to build pursuant to valid planning permission granted by the first respondent. Consequently, he held that a modification of the appellant's building plans subject to an award of damages would be the best solution in these circumstances.

We were unanimous in holding that the preliminary objection as regard the period of six weeks did not apply to an application for a declaratory judgment as in this case and that the learned trial judge was right in refusing the injunction based on the reasons he had given. We accordingly dismissed the appeal with costs and ordered that the deposit is to go to the first respondent to account of their taxed costs.

Appeal dismissed with costs.

Reported by Chin En Tek